United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 16, 2003

TO : Roberto G. Chavarry, Temporary Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: American Postal Workers Union
Case 13-CA-17493-1

This case was submitted for advice as to whether the Union breached its duty of fair representation to an employee by failing to notify her of a grievance settlement providing for her reinstatement, and/or by failing to pursue arbitration of another grievance for wages lost due to her delayed reinstatement. We conclude that the Region should dismiss the charge, absent withdrawal.

FACTS

Employee Allen was terminated in May 1998. The Local Union filed a grievance challenging the termination. The Employer and the International Union settled the grievance in October 1999, prior to arbitration, with rescission of the notice of removal.[1] No one notified Allen about the settlement and reinstatement, and she did not report to work.

On May 23, 2001, more than a year and a half later, the Employer sent Allen an "Absence from Duty" letter requiring her to report for duty within 5 days of receiving the letter or provide evidence of incapacitation. Allen contacted Local Union President Malone, learned of the settlement, and reported to work shortly thereafter.

On the same day that it notified Allen of the settlement, the Union filed a grievance on her behalf seeking backpay for the time she had been reinstated to the job but not working (the "backpay grievance"). The basis for the grievance was the Union's argument that the Employer violated the contract by failing to notify Allen of her reinstatement pursuant to the settlement. The Employer denied the grievance at Steps 1, 2, and 3 on the grounds that nothing in the contract required the Employer to notify a grievant of the resolution of the grievance. In February

---

[1] Under the parties' procedure, grievances are processed through Steps 1 and 2 at the local level, and through Step 3 and arbitration at the national level.

2002, the International Union decided not to seek arbitration of the backpay grievance. It notified the Local Union of that decision with a letter which stated that "the record does not support appealing this case to arbitration" and that the case was a "bad case – makes us look bad."

In late 2001, and apparently throughout 2002, Allen contacted Malone regularly about the status of the backpay grievance and was told that "it takes a long time to process grievances, sometimes up to 7 years." In February 2003, Allen confronted Malone in the cafeteria of her workplace, asked him what was going on with her backpay grievance, and was told that "they wouldn't go for it." Malone further explained that Percy Harrison (the International business agent) had signed off on "the decision." Allen told him that did not sound like a formal decision, and she continued to contact Malone weekly in an effort to get a copy of any formal decision that had been made. When Malone did not respond, she eventually contacted Harrison's office, was told that the case had been "settled," and was sent a copy of the above-described letter from the International to the Local explaining its decision not to seek arbitration.

ACTION

We conclude that the Union did not violate its duty of fair representation, with regard to the first grievance, by negligently failing to notify Allen of her reinstatement. We further conclude that, since the Union could not be required to pay Allen backpay for its failure to pursue the meritless backpay grievance, it would not effectuate the Act to litigate the question of whether the Union's conduct regarding that grievance violated its duty of fair representation.[2]

A union breaches its duty of fair representation to the employees it represents when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.[3] Under that standard, the Board and courts have included "perfunctory" processing of a grievance as one type of "arbitrary" conduct. It is clear, however, that a union does not violate its fair representation obligation by acting negligently, and a union's negligence cannot

---

[2] This case was also submitted for advice as to the Section 10(b) issues presented by Allen's charge. In view of our decision on the merits, it is not necessary to resolve those issues.

[3] Vaca v. Sipes, 386 U.S. 171, 190 (1967).

establish perfunctory or arbitrary conduct.[4] Thus, where the Board has found violations based on a union's failure to inform a grievant as to the status of her grievance, the violations have been premised on a finding that the union intentionally kept the grievant misinformed; i.e., either the union's conduct clearly was willful or was presumed to have been willful because no other explanation was either given by the union or suggested by the record.[5] Where a failure to inform was merely negligent, the Board has found no violation.[6]

Here, the Union's failure to inform Allen of the successful resolution of her first grievance was obviously an oversight and, while certainly "negligent," could not be presumed to be intentional absent some evidence of willful conduct. This was not a failure to convey a decision to halt processing of a grievance, but a failure to convey a final resolution in the grievant's favor which the Union would have no reason to conceal. The Union acknowledged its negligence in its documentation regarding the second grievance, which it declined to pursue to arbitration in part because the case "makes us look bad." In these circumstances, we conclude that there is insufficient evidence to allege arbitrary grievance handling, and that the allegation should be dismissed.

With regard to the backpay grievance, it is apparent that at least one motive for the Union's refusal to pursue the case to arbitration was an invidious one – i.e., the Union did not want to admit before an arbitrator that it had failed to notify Allen of her reinstatement for more than a year and a half. Moreover, despite Allen's repeated requests for information, the Union willfully failed to notify her that it had decided not to pursue arbitration of the backpay grievance.

On the other hand, it appears that the Union also considered the merits of the grievance in deciding not to go

---

[4] See SEIU Local 3036 (Linden Maintenance), 280 NLRB 995 (negligence is insufficient to establish a breach of the duty of fair representation).

[5] Id. at 996-997; Retail Clerks Local 324 (Fed Mart Stores), 261 NLRB 1086 (1982).

[6] See Office Employees Local 2, 268 NLRB 1353 (1984), enfd. sub. nom. Eichelberger v. NLRB, 765 F.2d 851 (9th Cir. 1985) (complaint dismissed where union had negligently failed to inform a grievant of its decision not to process her grievance).

forward to arbitration. Thus, the Union concluded that "the record did not support" an appeal, apparently after concluding that there was no basis on which to challenge the Employer's Step 3 decision.[7] Indeed, the Region has determined that it likely could not establish that the Employer had a contractual obligation to notify Allen of the resolution of the first grievance, and therefore likely could not establish that the second grievance was meritorious. Absent that showing, a backpay award would not be appropriate.[8] Since the only remedy Allen seeks is backpay, it would not effectuate the purposes of the Act to issue a complaint that will not, even if successful, yield a backpay award.

Accordingly, the Region should dismiss the charge absent withdrawal.

B.J.K.

[7] It is unclear whether the Union could demonstrate, in this "mixed motive" case, that it would have declined to pursue arbitration, absent the individious reason, because of the likelihood that it would not prevail in arbitration.

[8] See Branch 3126, National Association of Letter Carriers, 330 NLRB 587, 588 (2000); Iron Workers Local 377, 326 NLRB 375 (1998).